Circuit Court for Charles County
Case No. C-08-FM-23-001448

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 2229

September Term, 2024

SPENCER NELSON

v.

JENNIFER NELSON

Friedman,
Tang,
Kehoe, Christopher B.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Tang, J.

Filed: September 16, 2025

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

This appeal arises from the dissolution of the marriage of appellant Spencer Nelson ("Father") and appellee Jennifer Nelson ("Mother"). The Circuit Court for Charles County granted the parties a divorce pursuant to an order entered September 27, 2024 and amended on December 23, 2024. On appeal, Father raises the following questions for our review:

I. Did the trial court abuse its discretion in deciding legal custody, physical custody, and visitation?

II. Did the trial court err in failing to determine whether Mother was voluntarily impoverished for purposes of a child support award?

III. Did the trial court err in deciding property issues under the Marital Property Act?[1]

IV. Do the cumulative errors of law and fact warrant a new trial?

For the reasons stated below, we shall affirm in part and vacate in part.

BACKGROUND

The parties were married on June 26, 2010, and they have two children. They separated in the spring of 2023 but continued to live together in the marital home during the divorce proceedings.

On October 3, 2023, Mother filed a complaint for absolute divorce. She requested sole legal and physical custody of the children as well as child support. She also sought a

[1] The Marital Property Act is embodied under Md. Code Ann., Family Law Article ("FL") §§ 8-201 to 8-214 (1984, 2019 Repl. Vol.). The Act reflects "the State's policy that 'when a marriage is dissolved the property interests of the spouses should be adjusted fairly and equitably, with careful consideration being given to both monetary and nonmonetary contributions made by the respective spouses to the well-being of the family.'" *Alston v. Alston*, 331 Md. 496, 506 (1993) (quoting 1978 Md. Laws ch. 794, preamble). The essential aim of this statutory scheme is "to ensure that the value of both real and personal property is distributed in a fair and equitable manner." *McGeehan v. McGeehan*, 455 Md. 268, 279 (2017).

determination of the value of all marital property, a monetary award, equitable distribution of marital property, use and possession of the family home and family use personal property, and counsel fees. Father filed a counter-complaint for absolute divorce, which included similar requests. Neither party requested alimony.

The circuit court conducted the merits hearing over three non-consecutive days: May 6, August 19, and September 27, 2024.[2]

Parties' Statuses

The parties were about 38 years old at the time of trial. Father has served as a JAG attorney and an active-duty Air Force major since 2014. During the marriage, the family relocated due to Father's military orders: first to the United Kingdom, from 2014 to 2017; then to Denver, Colorado, from 2017 to 2019; and then to San Antonio, Texas, from 2019 to 2021. In 2021, Father received his current orders to Andrews Air Force Base in Maryland, and the family moved to Charles County.

At the start of trial in May 2024, Father was working as an appellate defense attorney with USAF JAG Corps. He was later transferred to a different office that allowed him to telework a minimum of two days each week. He earned a monthly salary of $13,200.

Mother holds a bachelor's degree in information systems management. Before the marriage and during its early years, she worked for PriceWaterhouseCoopers. After the youngest child was born in 2017, she became a stay-at-home mother. In the spring of 2021, Mother re-entered the workforce as an independent contractor, earning $9,083 per month.

[2] Due to a scheduling conflict with Father's counsel, the merits hearing was held over three non-consecutive days.

She scheduled her work hours to coincide with the time the children were at school. During the summer months, she took on less work to care for the children.

Both parties testified about each other's mental and physical health. Father experienced depression and anxiety and was diagnosed with a milder form of depression, for which he was taking medication. In addition, Father has hypothyroidism, which impacted his energy levels and immune system. However, this condition did not hinder his ability to care for the children.

Mother developed a panic disorder in 2021 after the COVID-19 pandemic. She sought therapy and underwent exposure therapy. Mother testified that she no longer has this issue and does not seek treatment for it anymore.

Custody Requests

At the time of the trial, the parties' children were in elementary school, with the youngest child, aged eight, entering the third grade and the oldest, aged ten, entering the fifth grade. Both children have been diagnosed with autism and see a developmental pediatrician annually. The oldest child attends social skills classes once a week and participates in special interest groups, including creative writing, which support his pragmatic speech development. The youngest child also takes social skills classes and has been involved in special interest groups to gain more exposure to peers. In addition, the youngest child participated in Scouts, and Father usually took him to Scouts activities. Both children were diagnosed with asthma and required daily use of a nebulizer, along with medication through a rescue inhaler as needed.

During the marriage, Mother was the primary caretaker for the children. She took them to and from the school bus stop each day, assisted with their homework after school, and scheduled and transported them to social skills classes and extracurricular activities. She managed and took the children to medical appointments, while Father was involved when Mother had a scheduling conflict. Mother planned, shopped for, prepared, and served all their meals, except on Sundays and other special occasions when Father would cook. She alternated nights with Father to put the children to bed.

Mother wanted sole legal and primary physical custody of the children for several reasons. She highlighted Father's behavior during the divorce proceedings, explaining that Father started making "unilateral decisions" regarding the children and exhibited "control issues that don't allow [her] to have that close relationship" with the children.

Mother explained that after she filed for divorce in October 2023, Father became more interested in the children's schedules. He asked Mother about their homework routine and some of their extracurricular activities because he wanted to be more involved. He also wanted her "to report any deviations from [their] family routine directly to him in advance." In addition, he "dictated that he is doing certain things" and would not allow Mother "to do those things anymore[.]"

Mother testified that in the month she filed for divorce, Father decided to inform the children about the divorce. Mother objected to this conversation because the parties were "trying to work out [a] settlement back then, we didn't know when [Father] was leaving, we didn't know where he was going, we didn't know what the agreement would be in terms of visitation, custody, [and] whatever else." Since they were still living together, she

believed there was no need to have that discussion with the children. She felt the parties needed to resolve issues before speaking to the children about the situation.

Despite her objections, Father "decided the day and time" to tell the children about the divorce and told Mother she could join him if she wanted. He explained to the children that they were divorcing, stating that one reason for the discussion was that he wanted separate holidays, specifically to take them to Utah to visit his family for the upcoming Christmas. Mother disagreed with this reasoning and opposed Father's decision to have the children spend the holiday away from her, especially since they were still living in the same house and could spend the holiday as a family.

Mother testified that the parties' disagreements extended to purchasing Christmas gifts for the children. Mother had already purchased gifts and had agreed that Father could buy additional presents. However, Father purchased a $650 mountain bike for their oldest child, which Mother had previously objected to.

Mother described an "abrupt shift" in January 2024 when Father learned that his next military assignment would not take him away from Maryland. According to Mother, Father announced that she was no longer allowed to care for the children from Thursday through Sunday, even though they still lived together and there was no custody agreement or access schedule in place. Mother described three situations in which Father controlled or undermined her access to the children during this period:

Drop-Offs at the Bus Stop: Mother would walk the children to the bus stop for school, which was only half a block from their home. On Thursdays and Fridays, Father insisted on driving the children to the bus stop. As Mother and the children were leaving

the house to walk, Father would yell to the children, "[N]o, you're coming with me, get in my truck." Despite this, Mother continued to walk to the bus stop on those days. When she discussed the issue with Father, he told her that she "wasn't allowed to be there."

Bedtime with the Youngest Child: Mother explained that they had a routine of alternating nights for reading to and putting the youngest child to bed. On one of Father's assigned nights, he told the child in Mother's presence that she was not allowed to snuggle with him. He explained to the child that this was necessary so the child could get used to not having Mother around.

Meals: Mother testified that she regularly prepared meals for the children, while Father would occasionally make special meals for certain occasions. However, after January 2024, Father informed Mother that she was "no longer allowed to cook" for the children from Thursday to Sunday. Recognizing that Father had no authority to impose this restriction, Mother continued to prepare dinners for the children as she always had. However, when the dinners were ready, Father would announce other meal options to the children. When Mother objected, Father would respond, "[N]o, it's my day."

Another reason Mother sought sole legal and primary physical custody was her belief that Father demonstrated "poor judgment" in making medical decisions for the children. In November 2023, the children faced asthma issues that led to the oldest child being hospitalized. Around December 15, just two days before the children's flight to Utah, Father took them to urgent care to get "cleared" for travel without informing Mother. However, Mother testified that the children were showing symptoms of COVID-19 before

the trip, and the oldest child exhibited asthma symptoms and was wheezing on the day of the flight. Despite this, Father took the children to Utah.

In addition, Mother requested sole legal and primary physical custody because she believed that Father had shown "poor judgment in parenting," particularly by not respecting the children's privacy and boundaries. She testified that Father exerted control over the youngest child, who was modest and desired privacy. According to Mother, Father "target[ed]" and "provoke[d]" this child, failing to respect his boundaries and bodily autonomy.

Mother testified about specific incidents of this. In June 2023, Father took a nude picture of this child without his knowledge and sent it to Mother. When Mother asked Father to delete the photo, he instead showed it to the child, taunting and mocking him, which caused the child to cry.

In October 2023, the children visited a friend's family farm. When they returned home, Father wanted to check them for ticks. Father checked the youngest child's "private parts" in front of Mother, and the child protested. Even though the child was screaming, Father "yanked his underwear down," causing the child to further yell and cry.

In January 2024, when it was time for the youngest child to bathe, Father demanded that the child undress in the bedroom in front of the parties instead of in the bathroom so that Father could take the laundry to the laundry room. On another occasion, the youngest child was on a step stool in the kitchen putting dishes away as part of his chores. Father tugged on the child's shorts to pull them down, which upset the child.

In May 2024, while brushing his teeth, the youngest child had difficulty breathing and asked for his rescue inhaler. Father withheld the inhaler because the child had not finished brushing his teeth. The child pushed Father aside to reach his inhaler. Later, Father punished the child for interrupting and not completing his teeth-brushing.

Mother testified that Father would pinch the child's cheeks or tickle him, which would upset the child and cause him to scream for Father to stop. In the spring of 2024, Father repeatedly tickled and touched the youngest child while reading to him during bedtime, causing the child to scream and cry. On another occasion, Father pinched the child's cheeks at a soccer game, prompting the child to scream at him to stop. Mother explained that when the child reacted by yelling, hitting, or throwing something at Father, Father would claim that the child had "anger issues" and would punish him by putting him in time-out. On one prior occasion, Father threatened to destroy the child's tablet.

In August 2024, during the interval between the merits hearing dates, the children were sitting on the couch watching television. Father came downstairs and immediately grabbed the youngest child's big toe and pinched it. The child began screaming and became upset. Father called the child an "angry guy," which, according to Mother, was typically his defense—saying that the child has anger issues.

Mother testified that Father's disregard for boundaries also affected her. Between 2019 and 2023, Father "flicked" and "slapped" her breasts despite her repeated verbal and written protests. Father did this in front of the children and, at one point, when she was healing from an incisional breast biopsy.

Father disputed Mother's accounts and characterizations of various incidents, suggesting that she was dramatizing these events. Regarding legal custody, Father testified that it was Mother, not him, who refused to co-parent. He provided an example related to the baptism of their children. The family were members of the Church of Jesus Christ of Latter-day Saints. He explained that in 2018, Mother had a "crisis of faith" and expressed a desire to "dial things back" on their religious practices. The parties compromised by attending church every other week. However, in March or April 2024, when Father wanted to discuss the children's baptism, Mother refused to address the youngest child's desire to be baptized.

Regarding physical custody, Father stated that his new local assignment would allow him to follow a week-on, week-off schedule with the children. However, Mother believed that this schedule would not provide the stability, consistency, and routines that the children, who have autism, require. She further stated that Father's work schedule would not, and has never, met the children's needs without resorting to third-party care. She pointed out that even if he could manage this schedule, he would still be working from home while the children are present, leading to a situation where they would be "sitting on devices doing whatever" while he works.

Mother also explained that Father's job required him to travel and be deployed, which meant there was uncertainty about his location for the next year or two, during which time he might receive a new assignment. She did not want the children in an environment that lacked consistency. In contrast, Mother did not have these same challenges; she worked

while the children were in school, and she testified that both parents had agreed she would not work during the summers so she could care for the children.

Mother testified that if the court were to grant her sole legal and primary physical custody, she suggested that Father have access to the children every other weekend, from Friday after school until Sunday evening, along with a mid-week evening visit and alternating holidays. She opposed making the mid-week visit an overnight stay because she believed the children "thrive on structure and routine" and should be in the "same space" consistently after returning from school. Mother explained that she wanted the children to have a "consistent school routine" because school is challenging for them.

Property

For the most part, both parties agreed that their property, whether titled solely or jointly, was marital property. The parties disagreed, however, about the marital characterization of Mother's 401(k), which will be discussed further below. Mother timely filed her 9-207 statement pursuant to the Maryland Rules; however, Father did not submit his until August 30, 2024, after the second day of trial.[3] There were discrepancies in the two statements regarding the values of the property, partly because the figures in various

[3] Maryland Rule 9-207 requires the parties to "file a joint statement listing all property owned by one or both of them." Md. Rule 9-207(a). The rule requires that the joint statement must be filed "at least ten days before the scheduled trial date or by any earlier date fixed by the court." Md. Rule 9-207(c). If a party fails to comply with the rule, the court may enter an order with prescribed sanctions such as barring the noncomplying party from opposing designated assertions on the complying party's statement, or prohibiting the noncomplying party from introducing designated matters in evidence. Md. Rule 9-207(d).

accounts had fluctuated since Mother's filing and between hearing dates. The properties listed in the parties' 9-207 statements were as follows:

Real Property: The parties owned a jointly titled marital home in Maryland and a rental property in Texas, both of which were subject to a mortgage. Mother requested use and possession of the marital home for three years after divorce.

Vehicles: The parties jointly owned a Dodge Ram with a lien and a fully paid-off Honda Pilot. Mother requested use and possession of the Honda Pilot for the family for three years after divorce.

Financial Accounts: Mother had the following accounts in her name: a Capital One account where rental income from the Texas property was deposited, a First Citizens account, a Robinhood investment account, a Prosper account, a Fundrise investment account, a Coinbase cryptocurrency wallet, and a Coinbase cryptocurrency exchange account.

The parties had a joint Wells Fargo account, from which they paid counsel fees and other expenses.

Retirement Accounts: Father had a Thrift Savings Plan and a Vanguard account. Mother had a Vanguard Roth IRA.

As mentioned, Mother had a 401(k) plan with PriceWaterhouseCoopers that she started in 2008 while working there before the marriage. During the marriage, Mother rolled the 401(k) into a Vanguard Rollover IRA, which had a value of about $135,000 at the time of trial. As we will discuss further below, Mother testified, over objection, that she

had about $10,000 in the PriceWaterhouseCoopers 401(k) before getting married. Father asserted that the entire value of the Vanguard Rollover IRA was marital property.

Children's Financial Accounts: Each child had a separate 529 college savings account and Roth IRA. The parties agreed that these accounts should remain with the children.

Household Furniture and Items: Both parties itemized various household furniture in the marital home, the majority of which Mother requested use and possession of for three years after divorce. Additionally, between the second and final day of the hearing, Father purchased furniture and other items to furnish his new rental home, which he intended to move into after the divorce.[4]

The court issued an oral ruling on September 27, 2024 and granted the parties an absolute divorce. The Amended Judgment of Absolute Divorce, entered December 23, 2024, provided as follows.[5]

The court awarded Mother sole legal and primary physical custody of the children with access granted to Father, as detailed below.

[4] Father's purchases were not included in his 9-207 statement, as they were purchased after he submitted the statement.

[5] The amended judgment added provisions granting Mother's request to resume using her maiden name and requiring the parties to divide uninsured medical expenses for the children equally. These provisions were omitted from the court's original September 27, 2024 Judgment of Absolute Divorce.

The court ordered Father to pay monthly child support of $2,241 commencing October 1, 2024. The calculation was based on Father's monthly income of $13,200 and Mother's monthly income of $9,083.[6]

The court granted Mother use and possession of the marital home and family use personal property in the home for three years, after which a trustee would be appointed to sell the marital home, with proceeds to be split equally. It ordered Father to retrieve a dining room table, specific Christmas decorations, and his firearms, which Mother acknowledged all belonged to Father.

The court ordered that the Texas property be sold and that "the proceeds of sale shall be divided as follows: 60% to [Mother] and 40% to [Father.]"

The court ordered that the Dodge Ram be solely titled to Father and the Honda Pilot be titled solely to Mother within 90 days. The order provided that if either party was unable to re-title their respective vehicle, then the vehicle would be sold and the proceeds split evenly between the parties.

The court ordered that "the following bank accounts shall be divided equally between the parties: Capital One, Wells Fargo, First Citizens Bank, Robin Hood[.]"

As for retirement accounts, the court awarded Mother "her share of [Father's] military Survivor Benefit Plan[.]" It further ordered that "each party is entitled to their share of the other party's retirement accounts per the *Bangs* formula[.]"

[6] The child support guidelines worksheet does not appear to be in the record.

As for Mother's 401(k), the court stated in its oral ruling that "the original [$]10,000 that she put in is non-marital, but the rest is split 50/50."[7]

The court granted Mother's request for counsel fees for certain filings she made in response to Father's actions. The court ordered Mother to submit an affidavit of fees for the determination of the amount later.

Father filed a timely appeal.[8] We include additional facts as appropriate below.

DISCUSSION

I.

CUSTODY AND VISITATION

Father argues that the circuit court erred in awarding Mother sole legal and primary physical custody of the children. He argues that the court erred in applying certain custody factors and that specific visitation provisions in the order were not supported by the evidence, were inconsistent with its findings, and/or were imposed without explanation.

Although courts are not limited to a list of factors in applying the best interest standard in each individual case, our appellate courts in *Montgomery County Department of Social Services v. Sanders*, 38 Md. App. 406 (1977), and *Taylor v. Taylor*, 306 Md. 290 (1986), have set forth a non-exhaustive delineation of factors that a court must consider

[7] The Amended Judgment of Absolute Divorce made no mention of the 401(k).

[8] Although the Amended Judgment of Absolute Divorce granted Mother's request for counsel fees as to specific motions, the actual amount was not determined. Nevertheless, the judgment of absolute divorce is appealable because counsel fees in family law cases are considered collateral matters that may be sought after entry of final judgment. *Blake v. Blake*, 341 Md. 326, 337–38 (1996).

when making custody determinations, which have been consolidated as follows: (1) the fitness of the parents; (2) the character and reputation of the parties; (3) the requests of each parent and the sincerity of the requests; (4) any agreements between the parties; (5) willingness of the parents to share custody; (6) each parent's ability to maintain the child's relationships with the other parent, siblings, relatives, and any other person who may psychologically affect the child's best interest; (7) the age and number of children each parent has in the household; (8) the preference of the child, when the child is of sufficient age and capacity to form a rational judgment; (9) the capacity of the parents to communicate and to reach shared decisions affecting the child's welfare; (10) the geographic proximity of the parents' residences and opportunities for time with each parent; (11) the ability of each parent to maintain a stable and appropriate home for the child; (12) financial status of the parents; (13) the demands of parental employment and opportunities for time with the child; (14) the age, health, and sex of the child; (15) the relationship established between the child and each parent; (16) the length of the separation of the parents; (17) whether there was a prior voluntary abandonment or surrender of custody of the child; (18) the potential disruption of the child's social and school life; (19) any impact on state or federal assistance; (20) the benefit a parent may receive from an award of joint physical custody, and how that will enable the parent to bestow more benefit upon the child; and (21) any other consideration the court determines is relevant to the best interest of the child. *Azizova v. Suleymanov*, 243 Md. App. 340, 345–46 (2019) (citing *Sanders* and *Taylor*, *supra*, and Cynthia Callahan & Thomas C. Ries, *Fader's Maryland Family Law* § 5-3(a), at 5-9 to 5-11 (6th ed. 2016) (footnotes omitted)).

Other factors that courts are encouraged to consider in custody determinations include: (1) the ability of each of the parties to meet the child's developmental needs, including ensuring physical safety, supporting emotional security and positive self-image, promoting interpersonal skills, and promoting intellectual and cognitive growth; (2) the ability of each party to meet the child's needs regarding, *inter alia*, education, socialization, culture and religion, and mental and physical health; (3) the ability of each party to consider and act on the needs of the child, as opposed to the needs or desires of the party, and protect the child from the adverse effects of any conflict between the parties; (4) the history of any efforts by one or the other parent to alienate or interfere with the child's relationship with the other parent; (5) any evidence of exposure of the child to domestic violence and by whom; (6) the parental responsibilities and the particular parenting tasks customarily performed by each party, including tasks and responsibilities performed before the initiation of litigation, tasks and responsibilities performed during the pending litigation, tasks and responsibilities performed after the issuance of orders of court, and the extent to which the tasks have or will be undertaken by third parties; (7) the ability of each party to co-parent the child without disruption to the child's social and school life; (8) the extent to which either party has initiated or engaged in frivolous or vexatious litigation, as defined in the Maryland Rules; and (9) the child's possible susceptibility to manipulation by a party or by others in terms of preferences stated by the child. *Id.* at 346–47 (citing *Fader's Maryland Family Law* § 5-3(b), at 5-11 to 5-12 (footnote omitted)).

Regarding visitation, a trial court has "broad discretion" to impose conditions on a parent's visitation rights "so long as it is in the child's best interest and there is sufficient

evidence in the record to support the condition." *Cohen v. Cohen*, 162 Md. App. 599, 608 (2005); *see also Kennedy v. Kennedy*, 55 Md. App. 299, 310 (1983) (explaining that a trial court may "impose such conditions upon the custodial and supporting parent as deemed necessary to promote the welfare of the children" and that an appellate court "will affirm the imposition of such a condition so long as the record contains adequate proof that the condition or requirement is reasonably related to the advancement of a child's best interests").

In reviewing child custody determinations, we employ three interrelated standards of review. *Gillespie v. Gillespie*, 206 Md. App. 146, 170 (2012). Our Supreme Court explained these three levels of review as follows:

> When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Rule 8-131(c)] applies. [Second,] if it appears that the [court] erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the [court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [court's] decision should be disturbed only if there has been a clear abuse of discretion.

Id. (alterations in original) (quoting *In re Yve S.*, 373 Md. 551, 586 (2003)). An abuse of discretion means that "no reasonable person would take the view adopted by the trial court," or the court acts "without reference to any guiding rules or principles." *Santo v. Santo*, 448 Md. 620, 625–26 (2016) (citation omitted) (cleaned up). "We will not reverse simply because we would not have made the same ruling." *Jose v. Jose*, 237 Md. App. 588, 599 (2018).

A.

Circuit Court's Findings

In awarding Mother sole legal and primary physical custody of the children, the court made the following findings.

The court found that the parents are both fit and proper. Regarding their character and reputation, the court found that the non-party witnesses testified that both parents are "amazing parents" and "very involved" with the children. The court found that the parties are caring, loving, and patient with the children.

The court determined that both parents were sincere in their requests for custody. It observed that Father had become more involved with the children since the divorce filing, likely due to the impending custody decision. Regarding their willingness to share custody, the parties disagreed as to the amount of time each should have with the children. The children were too young to express any preferences about the custody arrangement.

The court determined that both parents were capable of preserving the children's relationships with each other, the other parent, and relatives. Mother organized playdates and activities and kept Father involved with the family. Meanwhile, Father arranged video calls with his sister and other relatives in Utah and planned visits to see them.

The marital home and Father's rental home were located close to each other. The court found that both parties could maintain a stable and appropriate home for the children.

The parties were each gainfully employed. Mother worked as an independent contractor, which allowed her some flexibility to take time off during the summer. Her job demands did not interfere with her ability to spend time with the children.

Father served as a major in the military and an appellate attorney, holding a demanding position. The court found that his work had necessitated relocations to various states and countries. The court found Father credible when he testified that he would be able to spend time with the children. However, it was not convinced that he would have an "open schedule" to be present for them "when they get off the school bus and whatnot[.]" Although he had managed to achieve some flexibility in the weeks leading up to the trial, this required him to take leave from his job.

The court considered the ability of each party to meet the children's needs regarding matters such as religion and found the following:

> [T]he family is a member of the Church of Jesus Christ [of] Latter[-d]ay Saints. I think that they are wanting to impart that in, with their children, but there is some, there's a little bit of a disconnect between the parties on what the children -- how that plays out with the children. I think there was some testimony about wanting to go to church and wanting to set up a schedule and that being interfered with. But as I stated previously, the, the parties don't have an agreement and just living under the same roof, it's kind of difficult to set those in play.

The parties had not reached an agreement regarding custody or access. Because there was no agreement, the court found it "troubling" that a dispute arose over taking the children to the bus stop on days Father claimed he had custody of them. However, there was no history of alienation from either side, which highlighted each parent's ability to prioritize and act upon the children's needs rather than their own desires, as well as their capacity to protect the children from the adverse effects of conflict between them.

The court determined that both parties could co-parent the children without disrupting their school and social lives. The children were involved in various

extracurricular activities and programs, including Scouts, which Father took the youngest child to. The court remarked, "I think that's real positive and I think that . . . should continue."

The court expressed concern about the parties' ability to communicate regarding issues that affect their children's welfare, describing the situation as "really disconcerting[.]" This communication breakdown was a significant factor in the court's decision to grant Mother sole legal custody. The court observed that their interactions were "filled with animosity." It noted that Father was in a "rush" to prepare for litigation, which "created a toxic communication environment between the both of them." It concluded that, although their ability to communicate did not seem "very problematic" on the "surface," they did not "see eye to eye on major issues."

Although the parties were separated, they were living in the same house. The court noted the challenges of reaching shared decisions about the children while the parties were cohabitating during this contentious multi-day merits hearing, which stretched over several months. The court stated, "[W]hile you're living together, it's very difficult to say we're going to agree to do this and expect for you all to be on board when you're coming in to [c]ourt and you're basically mudslinging. You can't go home and then go like let's make sure we're following a good routine." The court pointed out various disagreements, such as when and how to tell the children about the divorce and how to purchase Christmas presents, remarking, "It's just really difficult to have a meeting of the minds."

The court noted that the children's autism was a significant factor in its decision to award sole legal custody to Mother. The court recognized that the children have a specific

routine they need to follow, that they require certain medications, and that there are best practices for managing autism effectively. The court did not find Mother's claim that Father was unable to remember the names of the children's medication to be compelling. Instead, the court focused on the fact that Father was aware of the children's autism and asthma and knew they needed medication to "address" these conditions, which was "paramount[.]"

The court stated that the relationship between the parties and the children was another significant reason for awarding Mother sole legal custody. It found that the relationships were generally positive, except for the concern that Father "lack[ed] boundaries" with the children. The court credited Mother's testimony about her observations regarding Father's interactions with the children, which included tickling, cheek-touching, and toe-wiggling. The court explained, "[B]eing playful is one thing, but when the child becomes visibly upset, . . . it's pushed a little bit too far." It observed that, if a child expressed discomfort by saying, "I don't like that," the parent needed to "pull[] back" so that the child understands "he has autonomy when it comes to his own body." The court expressed concern that Father did not recognize his child's boundaries and tended to downplay these issues.

The court referenced the incident where Father checked for ticks as another example of not respecting his child's boundaries. While the court acknowledged the importance of checking for ticks, it noted that this could have been done in a manner that did not make the child uncomfortable. The court explained that the child "already is challenged with autism" and expressed concerns about Father's approach to the situation, despite good intentions.

The court also referenced the incident where Father threatened to destroy the child's tablet for not following the rules. While the court acknowledged that Father was trying to do what was best for the child, it expressed concern that his approach should have been more considerate of the child's autism. The court explained:

> And I know you said we do this at bedtime and if he's not, I, I looked for it because you made it, kind of a comment like, you know, he said like oh, like, you know, I want to do this, I think there's just an appropriate way to do it based on what his challenges are and I just want it, want you to be sensitive to the fact that it can come off that you're not obedient, so, therefore, I'm going to threaten to take away something, not only take away something, but destroy something, which again could have like some adverse effects on, on his, his mental well-being to have something like that threatened. He doesn't know if you're serious and so I just, I just find that that's something that needs to be looked into.
>
> Being tickled, pinched cheeks, taking tablet, go to time-out. I just think that these children are under the care of doctors over their autism and their emotional issues and I think that all of that, while well meaning as coming from a father, it just needs to be a little bit more sensitive. And I just have concerns about that.

The court found Mother credible when she testified that Father had "flicked" her breast, that she did not consent to this conduct, and that he continued to do so after her breast biopsy in a "malicious way." The court found that Father's downplaying his conduct as harmless was consistent with his reaction to the child's request for him to stop tickling and grabbing his cheeks, indicating a lack of recognition of boundaries.

The court did not characterize this conduct as physical abuse. Indeed, Mother trusted Father enough to leave the children alone in his care and had no real safety concerns about leaving them with him unsupervised. However, the court found that Father's conduct towards Mother regarding her body was a "form of emotional abuse" towards her. In

addition, the court found that Father informing the children about their parents' divorce, despite Mother's objections regarding the timing and manner of the conversation, constituted "a form of control and emotional abuse." In another part of its ruling, the court stated that, based on its observations of Father's demeanor on the stand, it "found him to be absolutely controlling and emotionally abusive in some of his dealings with his minor children and with [Mother] in general, mainly her for the emotional abuse, but some of that lack of boundaries I found disturbing."

The court found that Father's proposed custody schedule, where the children would alternate spending one week with Father and one week with Mother, might disrupt their continuity in schoolwork, social skills classes, and extracurricular activities. In contrast, the court found that a custody arrangement where the children spend every other weekend with Father, along with one parent helping them with homework each night, could provide better continuity.

Based on the foregoing findings, the court awarded Mother sole legal and primary physical custody of the children. Father was granted access every other weekend from Friday to Sunday evening, with exchanges taking place at a police station unless the parties agreed otherwise. Additionally, Father would have three non-consecutive weeks with the children during the summer break. The court also established a holiday schedule and advised the parties to collaborate on modifying the schedule for birthdays and other special occasions.

B.

Analysis

Father challenges the court's decisions regarding custody and visitation in various ways. We address them *seriatim*.

1. Cohabitation in the Marital Home During the Pendency of the Divorce

Father argues that the court abused its discretion in penalizing Father for remaining in the marital home during the divorce proceedings, which he was allowed to do. He claims that the court repeatedly commented on the negative environment in the home and "appears to have penalized Father for declining to move out" of the house. He contends that the court's ruling was based almost entirely on the parties' conduct during the strenuous period of cohabitation. Specifically, the court focused on Father's interactions with the children and "controlling" behavior in trying to carve out his own opportunities for parenting time. He contends that the court "ultimately decided only to penalize Father" for remaining in the home during this time.

We disagree with Father's characterization that the court penalized him for remaining in the home during the divorce proceeding. The court's only remark regarding the parties' cohabitation was about the difficulty of working together for the children's best interest during a contested divorce while still living together, and its regret that the multi-day trial had been spread out over months rather than concluded earlier. Father's contention that the court penalized him for remaining in the home during the divorce proceeding is not supported by the record and is without merit.

2. Father's Involvement in the Children's Lives Before the Divorce

Father argues that the court erred in refusing to admit a log he prepared of moments he shared with his children over the years. The log contained columns for "date," "location," "activity," "status," and "evidence," and it included descriptions of Father's activities since 2013, accompanied by photographs.

Father attempted to admit the log to demonstrate that he had been involved in caring for the children over the years. Mother objected because the log had not been produced in discovery. The court sustained the objection. Father proceeded to testify without objection as to the contents of the log and why he prepared it:

> I put in the tracker as it relates to the most current my daily activities with the kids and what I did with them and then I also wanted to put some substantiate [*sic*] evidence, so I put a picture in there. And then for the long range-stuff, since they were born, I just did one thing a month, just to show that I was involved in the kid's life and usually put a picture in there to [*sic*] so that what I said was true.

Father further testified that the log contained pictures showing him holding the children, making them dinner, and using a "special calming technique" to calm them. He stated that the log contained "numerous pictures" of Father carrying a child in a chest strap, a visit to the Air and Space Museum and the National Cathedral, "tons of outdoor stuff" with the children, and weekly social activities with them, including attending Scouts and church.

Father testified that when he was not deployed, he was "extremely involved" with the children. He testified that he was "100 percent involved" with them and that his caretaking duties included putting them to bed every other day and shopping for them.

At the next hearing date, Father again attempted to introduce the log, which had been supplemented with additional entries. Mother's counsel objected for the same reasons as stated earlier. Father's counsel indicated that he was offering the log to rebut Mother's claim that he was not involved with the children. The court stated that Father had already "testified as to what he's done to parent with the kids" and therefore questioned why the admission of the log was relevant. Father's counsel explained that the contents of the log would corroborate Father's testimony. The court sustained the objection.

Relying on *A.A. v. Ab.D.*, 246 Md. App. 418 (2020), Father argues that the court abused its discretion in excluding the log based on a discovery violation. However, his reliance on the case is unavailing. In *A.A.*, the father propounded discovery requests to the mother in connection with his motion for modification of custody. *Id.* at 426. At the modification hearing, the father's counsel requested that the court exclude the testimony of witnesses for whom the mother had failed to provide contact information and certain documentary evidence. *Id.* at 427. The court granted the father's request, ruling that any witness for whom information was requested and not disclosed would not be permitted to testify. *Id.* at 428–29.

On appeal, we held that the trial court erred in failing to inquire as to the content of the testimony before excluding it. *Id.* at 447. Our analysis began with the principle that, in child custody cases, "[c]hildren have an indefeasible right to have their best interests fully considered." *Id.* at 422. We explained that "[b]ecause the court did not explore what evidence [the m]other intended to offer, the court could not have known the significance

of the proscribed evidence and its potential impact on its ability to determine the best interests of the children." *Id.* at 448.

In the instant case, the court did exactly what the court did not do in *A.A.*—that is, "explore what evidence [Father] intended to offer" to assess its potential significance. *Id.* Before the court sustained the objection to the log the first time, Father had already indicated that the log contained pictures showing his involvement with the children. In addition, during the colloquy with the court, Father's counsel further proffered that the log was "identical" to the log Mother had previously admitted and that his log "was just in response to that." By the time Father tried to admit the updated log at the next hearing date, he had already testified to its contents and to various instances to show that he was involved with the children's lives. The court essentially concluded that the admission of the updated log was cumulative. We cannot say that the court abused its discretion in its ruling.

3. Ability of Each Party to Meet the Children's Needs Regarding Religion

Father argues that the court's finding that both parents "want[] to impart" their religion in the children and that there was "a little bit of a disconnect" on how to go about it was contrary to the testimony and evidence. He claims that this erroneous finding was caused by the court's interference during his testimony on the topic of religion, which limited the court's ability to collect the necessary facts to render an appropriate custody decision. He cites an instance when he attempted to testify about issues between the parties regarding religion on the first day of trial. He claims that the court "immediately interrupted and took over the questioning, requiring [him] to answer highly specific, unintuitive questions of its own making instead of allowing his testimony to develop through

reasonable, open-ended questions as asked by his own attorney, cutting off each attempt to do so."

We disagree that the court's findings were clearly erroneous or that the court's interruption prevented it from gathering information regarding this factor. The testimony to which Father refers related to the parties' inability to make joint decisions about the children's religion. On the first day of trial, Father testified that the family were members of the Church of Jesus Christ of Latter-day Saints and that he took the children to church every other week. When Father's counsel questioned him on direct examination about the extent of his family's involvement in the religion, the court interjected and tried to get Father's counsel to focus the questioning on testimony relevant to assist the court in deciding custody. For instance, the court asked Father whether Mother had interfered with his ability to take the children to church, to which he said no.

The court then directed Father's counsel to proceed with direct examination. At that point, Father's counsel sought to introduce evidence that Mother would not discuss one child's desire to be baptized. Father's counsel asked Father about instances when Mother had not co-parented regarding aspects of religion. The court interjected that counsel was seeking a "narrative." The court then requested a proffer of Father's testimony, to which counsel indicated that Mother had "systematically undermine[d]" him, without providing the court with a specific timeframe. Based on the proffer, the court directed counsel to narrow the scope of the questions to specific instances.

After a further exchange between Father's counsel and the judge, Father ultimately testified to a specific example in which Mother and Father had a conversation with the

child four weeks prior to trial about the child getting baptized. The court encouraged Father: "That's what I'm trying to get to. . . . That's it, that's it, because . . . if you say something general, it doesn't help me." The court further explained to Father that, "it's nothing against your attorney, it's just that if I say something that's calling for a narrative, I have the obligation to make sure you narrow it so that when I write it down on what happened, I can be precise[.]"

Father proceeded to testify that on this occasion, Mother "refused to sit down with [him and one of the children] and talk about [the child's] desire to be baptized so then we could schedule it with the Bishop of our church. And so she refuses to co-parent and talk about that with me and her and [the youngest child]." Father also testified that, although Mother had "a crisis of faith," "didn't believe anymore," and wanted to "dial things back," Father wanted to raise the children in his religion. Accordingly, he stated, the parties had "made a compromise of going [to church] every other week." Father testified that he took the children to church every other week, and Mother attended occasionally. Father did not present any further evidence regarding the topic of religion.

Based on the record, we cannot say that the court's interruption prevented it from gathering information regarding this factor. Father was ultimately allowed to testify about the children's needs regarding religion, and he did not present any evidence on the issue beyond this testimony. Nor can we say that the court's findings under this factor were clearly erroneous.

4. Mental Health of the Parties and Their Fitness as Parents

Father argues that the court erred in admitting testimony regarding his mental health diagnosis and treatment. On the first day of trial, Mother's counsel asked Father if he was currently on medication. His counsel objected, citing the psychotherapist-patient privilege under Md. Code, Cts. & Jud. Proc. ("CJP") § 9-109 and *Laznovsky v. Laznovsky*, 357 Md. 586 (2000). The court overruled the objection, and Father testified that he took Cymbalta for his dysthymia, a mild form of depression.

In relevant part, CJP § 9-109 provides:

> (b) Unless otherwise provided, in all judicial, legislative, or administrative proceedings, a patient or the patient's authorized representative has a privilege to refuse to disclose, and to prevent a witness from disclosing:
>
> (1) Communications relating to diagnosis or treatment of the patient; or
>
> (2) Any information that by its nature would show the existence of a medical record of the diagnosis or treatment.

The purpose of the privilege is to protect "confidential communications between a psychotherapist and her patient from involuntary disclosure." *McCormack v. Bd. of Educ. of Balt. Cnty.*, 158 Md. App. 292, 306 (2004).

In *Laznovsky*, the Supreme Court of Maryland held that, while the mental and physical health of a party is an issue to be considered by the trial court in a custody case, a person seeking custody who claims to be a fit parent does not, without more, waive the privilege under CJP § 9-109 with respect to his or her past mental health "diagnosis and treatment" communications and records. 357 Md. at 620–21. However, *Laznovsky* did not hold that a party is wholly protected from testimony as to their mental health.

"The Maryland privilege, by its terms, extends only to records and communications dealing with 'diagnosis and treatment.'" *Id.* at 593 n.5; *see also Reynolds v. State*, 98 Md. App. 348, 368 (1993) ("Privilege statutes must be narrowly construed."). "Records of statements made by the patient during group therapy sessions, records of statements made by the patient to other patients during a hospital stay, and records of medication prescribed for the patient[, while confidential,] are not privileged under [CJP] § 9-109." *Reynolds*, 98 Md. App. at 368; *accord Shady Grove Psychiatric Grp. v. State*, 128 Md. App. 163, 179 (1999) ("There is a statutorily recognized difference in scope between a privileged communication and the confidentiality of a medical record.").

Here, Mother's counsel's inquiry during trial did not seek diagnosis and treatment communications between Father and his psychiatrist or therapist; nor did counsel seek records about his diagnosis and treatment. Instead, Father testified about his own personal knowledge of his diagnosis and medication. Thus, the privilege did not apply, and the court did not err in admitting Father's testimony about his mental health diagnosis and treatment.

5. Children's Autism-Related Needs

Father argues that the court's findings regarding the children's autism-related needs and the court's criticisms about Father's parenting were not supported by testimony from a medical expert or medical records related to their diagnosis. He contends that it was error for the court to make findings critical of his parenting based on Mother's "biased" testimony, "unsupported opinions about the children's needs and feelings," and without independent evidence of the children's condition.

Father's argument mainly concerns how the court weighed the evidence. "The weighing of the evidence and the assessment of witness credibility is for the finder of fact, not the reviewing court." *Terranova v. Bd. of Trs. of Fire & Police Emps. Ret. Sys. of Balt. City*, 81 Md. App. 1, 13 (1989). "Such broad discretion is vested in the [trial court] because only [it] sees the witnesses and the parties[and] hears the testimony . . . ; [it] is in a far better position than is an appellate court, which has only a cold record before it, to weigh the evidence and determine what disposition will best promote the welfare of the minor child." *Reichert v. Hornbeck*, 210 Md. App. 282, 304 (2013) (citation omitted).

The court heard testimony from Father regarding his parenting and his explanations for instances cited by Mother of Father's parenting, disciplining, and his inability to respect the children's boundaries and bodily autonomy. The court made findings based on that testimony—that the children were diagnosed with autism, they needed stability and routine, and there were "best practices" for dealing with autism. The court made no finding that Father's parenting methods violated any best practices. Instead, it merely expressed concerns about the way he parented and suggested that he consult a professional to understand how to gain compliance from the children when they were not following the rules. The court found Mother credible in weighing the evidence. Its findings were not clearly erroneous.

6. Visitation

Father challenges specific provisions in the Amended Judgment of Absolute Divorce concerning visitation. First, he points out that Mother had suggested that Father have a mid-week visitation schedule, but the court did not award him any mid-week visits

as part of the regular visitation schedule. Second, the court found that Father's taking at least one child to Scouts events should continue. However, the court did not take this into account when fashioning the regular visitation schedule, as it granted Father visitation with the children only every other weekend, from Friday after school to Sunday afternoon. Finally, Father takes issue with the provision requiring that exchanges occur at a police station even though there was no history of abuse between the parties or against the children.

We agree with Father on the first two points but differ on the third. Regarding the first point, the court failed to explain why it denied the mid-week visit, despite Mother's recommendation for it during her testimony. In other words, the evidence did not support withholding the mid-week visit from Father under the regular visitation schedule.

Regarding the second point, the court mentioned during its oral ruling that Father should continue taking the child to Scouts events. However, it did not seem to consider how the regular visitation schedule would impact Father's ability to take the child to this activity. In this regard, the court's order regarding the regular visitation schedule was inconsistent with its own finding.

Regarding the third point, there was evidence to support the court's order "that non-school-day exchanges shall be at the La Plata Police Station, or at another location as mutually agreed by the parties[.]" The evidence indicated, and the court found, that the parties' communications were characterized by animosity. During its oral ruling, the court expressed concerns about the interactions between Father and the children. It characterized Father as "controlling and emotionally abusive" in his "dealings" with both Mother and

the children. This characterization was supported by the evidence and the court's observations of Father's demeanor while testifying. We discern no abuse of discretion by the court in imposing this requirement, as the court stated it is "the safer way to go for now."

For the reasons stated, we shall vacate the Amended Judgment of Absolute Divorce as it relates to the regular visitation schedule and remand for reconsideration of that schedule.[9] We otherwise affirm the court's decision to award Mother sole legal and primary physical custody of the children and to require "that non-school-day exchanges shall be at the La Plata Police Station, or at another location as mutually agreed by the parties[.]"

II.

VOLUNTARY IMPOVERISHMENT

Father argues that the circuit court erred in calculating child support when it declined to address his argument that Mother had voluntarily impoverished herself.

When determining child support pursuant to the child support guidelines, the court must determine the income of each parent. FL § 12-204. The court calculates a parent's income based on either "[a]ctual income" or "[p]otential income," depending on the parent's employment circumstances. FL § 12-201(i).

Actual income is defined as income from any source, including salaries, wages, commissions, bonuses, and other forms of compensation. FL § 12-201(b)(1), (3).

[9] Father did not raise any issues regarding visitation during holidays, summer breaks, birthdays, and other special occasions, so our decision to vacate the provision for the regular visitation schedule does not relate to those other visitation provisions.

Alternatively, a court can impute potential income to a parent if it determines the parent is "voluntarily impoverished," that is, when the parent makes "the free and conscious choice, not compelled by factors beyond his or her control, to render himself or herself without adequate resources." *Goldberger v. Goldberger*, 96 Md. App. 313, 327 (1993); *see* FL § 12-201(q) (defining "voluntary impoverishment").

In making that determination, the court should consider a variety of factors to determine whether the parent has "freely been made poor or deprived of resources." *Goldberger*, 96 Md. App. at 327. These factors include: (1) the parent's current physical condition; (2) the parent's level of education; (3) the timing of any change in employment or financial circumstances relative to the divorce proceedings; (4) the relationship between the parties before the divorce; (5) the parent's efforts to find and retain employment; (6) the parent's efforts to secure retraining if necessary; (7) whether the parent has ever withheld support; (8) the parent's past work history; (9) the status of the job market in the area where the parties live; and (10) any other relevant considerations presented by either party. *Id.* Though a court "need not use formulaic language or articulate every reason for its decision with respect to each factor," it must "clearly indicate that it has considered all the factors." *Doser v. Doser*, 106 Md. App. 329, 356 (1995). If the court finds that a parent is voluntarily impoverished, "child support may be calculated based on a determination of potential income." FL § 12-204(b)(1)(i).

In this case, the court made no express oral or written ruling on Father's claim that Mother voluntarily impoverished herself. Although Father's counsel and the court engaged in an extended colloquy about the applicability of voluntary impoverishment during closing

argument, we cannot infer from the colloquy that the court rejected the claim. Nor can we conclude that the court implicitly rejected the claim by using Mother's actual income in calculating child support.

Accordingly, we vacate the child support award.[10] On remand, the parties are entitled to a new evidentiary hearing on the issue of child support. To the extent the claim of voluntary impoverishment is raised again, the court should expressly make a finding on the issue.

III.

PROPERTY

A.

Use and Possession of Family Home and Family Use Personal Property

Father argues that the court erred in awarding Mother use and possession of the marital home and the personal property in the home (other than the dining room table, specific Christmas decorations, and his firearms, which Mother acknowledged were non-marital). "'Family home' means the property in this State that: (i) was used as the principal residence of the parties when they lived together; (ii) is owned or leased by 1 or both of the parties at the time of the proceeding; and (iii) is being used or will be used as a principal residence by 1 or both of the parties and a child." FL § 8-201(c)(1); *but see* FL § 8-201(c)(2)

[10] As will be explained in Section III.B.4 *infra*, we must vacate the child support award for another reason.

(excluding such property where it is "(i) acquired before the marriage; (ii) acquired by inheritance or gift from a third party; or (iii) excluded by valid agreement").

"'Family use personal property' means tangible personal property: (i) acquired during the marriage; (ii) owned by 1 or both of the parties; and (iii) used primarily for family purposes." FL § 8-201(d)(1). It includes motor vehicles, furniture, furnishings, and household appliances, FL § 8-201(d)(2), but not property acquired by inheritance or gift from a third party or excluded by valid agreement, FL § 8-201(d)(3).

"When the court grants an . . . absolute divorce," the court may decide that one of the parties shall have the sole possession and use of the family home or family use personal property or divide the possession and use of the property between the parties. FL § 8-208(a)(1). In doing so, the court must determine preliminarily which property constitutes the family home and the family use personal property. *See* FL § 8-207(a) ("In a proceeding for . . . absolute divorce, the court may determine which property is the family home and family use personal property: (1) before the court grants an . . . absolute divorce; or (2) when the court grants an . . . absolute divorce."); *Pitsenberger v. Pitsenberger*, 287 Md. 20, 26 (1980) (citing the predecessor to FL § 8-207). In awarding possession and use of the family home and family use personal property, the court must consider each of the following factors:

> (1) the best interests of any child;
>
> (2) the interest of each party in continuing:
>
> (i) to use the family use personal property or any part of it, or to occupy or use the family home or any part of it as a dwelling place; or

(ii) to use the family use personal property or any part of it, or to occupy or use the family home or any part of it for the production of income; and

(3) any hardship imposed on the party whose interest in the family home or family use personal property is infringed on by an order issued under . . . this subtitle.

FL § 8-208(b).

Father does not dispute that the marital home constitutes a "family home" under FL § 8-201(c)(1). Instead, he argues that the court failed to determine which tangible property within the home qualified as family use personal property under FL § 8-207(a). In addition, he argues that the court's ruling did not reflect consideration of the factors under FL § 8-208(b) in awarding use and possession of the family home and family use personal property. We agree with Father. Accordingly, we vacate the Amended Judgment of Absolute Divorce as to the use and possession of the family home and family use personal property and remand for further proceedings. On remand, the parties are entitled to a new evidentiary hearing on this issue.

B.

Property Distribution

The purpose of the Marital Property Act is "to divide equitably and fairly the property interests of spouses by giving consideration to the monetary and non-monetary contributions of each spouse." *Hoffman v. Hoffman*, 93 Md. App. 704, 711 (1992). "In order to alleviate any inequities between the parties, the Act provides for a monetary award [an award of money] to be granted." *Id.* "The monetary award is thus an addition to and not a substitution for legal division of the property accumulated during marriage, according to

title. It is 'intended to compensate a spouse who holds title to less than an equitable portion of that property.'" *Malin v. Mininberg*, 153 Md. App. 358, 427 (2003) (citations omitted).

In addition to making a monetary award, the court may transfer *specific* kinds of property interests according to statutory authority. *See* FL § 8-205(a) (subject to certain requirements, the court "may transfer ownership of an interest in property [described below], grant a monetary award, or both"); FL § 8-202(a)(3) ("*Except as provided in § 8-205 of this subtitle*, the court may not transfer the ownership of personal or real property from one party to the other." (emphasis added)). FL § 8-205(a)(2) gives the court authority to transfer the following real and personal property in a proceeding for absolute divorce:

> (2) The court may transfer ownership of an interest in:
>
> (i) a pension, retirement, profit sharing, or deferred compensation plan, from one party to either or both parties;
>
> (ii) subject to the consent of any lienholders, family use personal property, from one or both parties to either or both parties; and
>
> (iii) subject to the terms of any lien, real property jointly owned by the parties and used as the principal residence of the parties when they lived together, by:
>
> 1. ordering the transfer of ownership of the real property or any interest of one of the parties in the real property to the other party if the party to whom the real property is transferred obtains the release of the other party from any lien against the real property;
>
> 2. authorizing one party to purchase the interest of the other party in the real property, in accordance with the terms and conditions ordered by the court; or
>
> 3. both.

Before it transfers ownership of an interest in the kinds of property just described, grants a monetary award, or both, the court must engage in a three-step process. The court must: (1) identify the marital property under FL § 8-203(a); (2) value the marital property

under FL § 8-204; and (3) consider the statutory factors under FL § 8-205(b) before fashioning any award. *Alston v. Alston*, 331 Md. 496, 499 (1993).

First, "if there is a dispute as to whether certain property is marital property, the court shall determine which property is marital property." FL § 8-203(a). Marital property is any property, "however titled, acquired by 1 or both parties during the marriage." FL § 8-201(e)(1). Marital property generally does not include property that the parties acquired before the marriage. FL § 8-201(e)(3)(i).

Second, after determining which property is marital, the court must value it. FL § 8-204(a). The party seeking the monetary award has the burden of proving the value of each item of marital property, and the circuit court makes the final determination about each item's value. *Williams v. Williams*, 71 Md. App. 22, 36 (1987) (citing FL § 8-205(a)). Valuation is not "an exact science," and the court is under no compulsion to accept the values the parties present to it. *Id.*

In the third step, the court shall consider the factors under FL § 8-205(b) in determining "the amount and the method of payment of a monetary award, or the terms of the transfer of the interest in property [described above], or both." These factors are:

(1) the contributions, monetary and nonmonetary, of each party to the well-being of the family;

(2) the value of all property interests of each party;

(3) the economic circumstances of each party at the time the award is to be made;

(4) the circumstances that contributed to the estrangement of the parties;

(5) the duration of the marriage;

(6) the age of each party;

(7) the physical and mental condition of each party;

(8) how and when specific marital property or interest in property described in subsection (a)(2) of this section, was acquired, including the effort expended by each party in accumulating the marital property or the interest in property described in subsection (a)(2) of this section, or both;

(9) the contribution by either party of property described in § 8-201(e)(3) of this subtitle to the acquisition of real property held by the parties as tenants by the entirety;

(10) any award of alimony and any award or other provision that the court has made with respect to family use personal property or the family home; and

(11) any other factor that the court considers necessary or appropriate to consider in order to arrive at a fair and equitable monetary award or transfer of an interest in property described in subsection (a)(2) of this section, or both.

FL § 8-205(b).

"The failure to comply with the three-step process requires vacation of any marital award made." *Campolattaro v. Campolattaro*, 66 Md. App. 68, 78 (1986).

As we explain below, we must vacate the Amended Judgment of Absolute Divorce as to the determination of the non-marital portion of Mother's Vanguard Rollover IRA account and the provisions relating to the distribution of property.

1. First Step

Under the first step, the parties seemed to agree that most of the property was marital, except for Mother's Vanguard Rollover IRA, a portion of which was initially held in her PriceWaterhouseCoopers 401(k) and later rolled into the Vanguard Rollover IRA. Father's challenge in this step is not about the court's failure to identify marital and non-

marital property. Instead, he challenges the admissibility of evidence relied on by Mother to establish the pre-marital value of the Vanguard Rollover IRA.

At trial, Mother presented a document showing the current balance of her Vanguard Rollover IRA account. This document was admitted into evidence without objection. She testified that the balance was $135,273.

Mother then attempted to introduce another document that showed the value of her 401(k) as of June 30, 2010, just days after the parties married. This document comprised two images. The top half appeared to be an excerpt of a PriceWaterhouseCoopers statement, which included Mother's "Retirement Plans Summary" reflecting an account balance of $10,126.55 for the period ending June 30, 2010. The bottom half was a screenshot from a website ("ofdollarsanddata.com") featuring an "S&P 500 Historical Return Calculator," which Mother used to calculate the investment growth of the alleged non-marital value of the 401(k), amounting to $62,327.95.

Father's counsel objected to the admission of the second document, claiming that "it's hearsay documentation." In response, Mother's counsel argued that the document provided information about the balance held at PriceWaterhouseCoopers, which amount was ultimately rolled into the Vanguard Rollover IRA account, as reflected in the first document that had already been admitted without objection.

The court overruled the objection without addressing Father's hearsay objection. Instead, it accepted Mother's counsel's argument and admitted the second document based on the premise that Father's counsel had not objected to the admission of the first document. In reply, Father's counsel maintained, "That's a different document. . . . There's

two different documents," emphasizing that the objection was specifically about the second document on hearsay grounds. The court overruled the objection and admitted the second document, stating that Father's counsel could "cross [Mother] on it."

The court erred in admitting the second document. The court admitted the document because it treated this document as essentially the same document or containing the same type of information as the one previously admitted without objection. However, the second document was different from the first and contained information maintained by a different institution. The second document, from which Mother testified, was the only evidence from which the court could have found that $10,000 of Mother's Vanguard Rollover IRA was non-marital. Because there was no other evidence in the record to support the court's finding as to the non-marital portion of Mother's Vanguard Rollover IRA and because we conclude that the court erred in admitting this document, we vacate the court's determination that $10,000 of the Mother's Vanguard Rollover IRA was non-marital.[11]

Because we are remanding the case on property issues for other reasons discussed below, we address Father's hearsay objection for guidance. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). Hearsay is inadmissible except as otherwise provided by the Rules or an applicable constitutional provision or

[11] Separately, Father argues that the court erred in allowing Mother to opine about the investment growth on the purported non-marital portion of the Vanguard Rollover IRA account. In addition, he argues that the court erred in not allowing him to call his expert to rebut Mother's opinion about the investment growth. We need not address these arguments given our disposition regarding the admissibility of the second document and the court's apparent rejection of Mother's opinion about the investment growth.

statute. Md. Rule 5-802; *Bernadyn v. State*, 390 Md. 1, 8 (2005) ("Hearsay . . . *must* be excluded as evidence at trial, unless it falls within an exception to the hearsay rule . . . or is 'permitted by applicable constitutional provisions or statutes.'" (quoting Md. Rule 5-802)). The exceptions are listed under Rules 5-802.1, 5-803, and 5-804.

The second document contained hearsay because it was being offered to prove the truth of the matter asserted—that the value of Mother's 401(k) as of June 30, 2010 was $10,126.55 and that the investment growth on this portion was $62,327.95. *See* Md. Rule 5-801(c). The business records exception to the rule against hearsay was the only exception discussed at the merits hearing. *See* Md. Rule 5-803(b)(6). However, both parties agreed that the second document was not a certified business record, so that exception did not apply.

2. Second Step

Under the second step, the court did not value any of the property listed on the parties' 9-207 statements or that was otherwise presented at trial.

3. Third Step

As we explain in subsection 5 below, the court transferred ownership of interests in property that is not authorized under FL § 8-205(a)(2). In addition, the court's ruling did not reflect that it considered all the factors under FL § 8-205(b) in determining any award. While the court is not required to enunciate every factor it considered on the record, it should at least state on the record that it considered the required factors in making any award. *Randolph v. Randolph*, 67 Md. App. 577, 585 (1986). In this case, the court explicitly stated that it "didn't necessarily consider" some of the factors under FL § 8-

205(b) in "arriv[ing] at a fair and equitable monetary award [and] transfer of [the] interest in property." FL § 8-205(b)(11). Instead, it considered only the contributions of the parties (Mother "carried the major load of caring for the children"), the circumstances that contributed to the estrangement of the parties (Father was "controlling and emotionally abusive" in particular "dealings" with Mother and the children), and the duration of the marriage ("a long marriage" of 14 years).

4. Vacatur

Divorce cases involve interconnected financial considerations. Claims for a monetary award, transfer of an ownership interest in property, child support, and counsel fees "'involve overlapping evaluations of the parties' financial circumstances.'" *K.B. v. D.B.*, 245 Md. App. 647, 679 (2020) (quoting *St. Cyr v. St. Cyr*, 228 Md. App. 163, 198 (2016)). Because the factors relevant to these claims are so interrelated, "when a trial court considers a claim for any one of them, it must weigh the award of any other." *Turner v. Turner*, 147 Md. App. 350, 400 (2002). This interconnection means that when this Court vacates one award, we often vacate the remaining awards for re-evaluation, even if neither party challenges those decisions directly. *See id.*

As a result of the court's errors in connection with the three steps, we vacate the determination that $10,000 of the Vanguard Rollover IRA account was non-marital property as well as all provisions related to the distribution of property in the Amended Judgment of Absolute Divorce. In addition to the reason discussed in Section II, *supra*, we vacate the provisions of the judgment regarding child support.

However, we do not vacate the order granting Mother's request for counsel fees, as the court has not yet entered a judgment in the amount of fees; the amount was never determined (*see supra*, n.8). On remand, the court may exercise its discretion and reconsider its ruling that granted Mother's request for fees. *See Rohrbeck v. Rohrbeck*, 318 Md. 28, 44 (1989) (until there is a final judgment, "under Rule 2-602, all prior rulings remain[] interlocutory and subject to revision"); *accord Bennett v. Ashcraft & Gerel, LLP*, 259 Md. App. 403, 457 (2023) (a court order that is not a final judgment is "an interlocutory order that the court [is] free to revise and reconsider at any time before the entry of a final judgment").

5. Remand

On remand, the court must reassess its decisions regarding all three steps: the determination of marital property, the valuation of marital property,[12] and the determination of any award (monetary award, transfer of ownership interests in property authorized by statute, or both) after considering the statutory factors. *See Fuge v. Fuge*, 146 Md. App. 142, 176 (2002). On remand, the court must consider the parties' economic circumstances as they exist at the time, not the circumstances at the time of the first divorce trial. *See id.* at 176–77. In other words, the court must "take a fresh look at the parties' circumstances to ensure the 'equitable' award that the law requires." *Id.* at 177. To give the court guidance on remand, we will address Father's other arguments.

[12] Valuing the property includes accounting for furniture and other personal property in the home. We understand that determining the value of these items can be challenging. However, unless both parties stipulate otherwise, the valuation must be based on competent evidence in the record.

a. Vehicles

The transfers of ownership interest in the parties' vehicles are authorized only if they qualify as "family use personal property" under FL § 8-205(a)(2) ("The court may transfer ownership of an interest in: . . . (ii) subject to the consent of any lienholders, family use personal property, from one or both parties to either or both parties[.]"); *see* FL § 8-201(d)(1), (2) (defining "family use personal property" as tangible personal property acquired during the marriage, owned by one or both of the parties, and used primarily for family purposes, including motor vehicles). In addition to not valuing the vehicles under step two of the analysis, the court erred by awarding the transfer of ownership interests in the vehicles without determining that they constitute "family use personal property."

To the extent that the parties have already transferred title of the vehicles, the court can consider their values and determine the entitlement of any monetary award on remand. *See Abdullahi v. Zanini*, 241 Md. App. 372, 410 (2019) (explaining that the vehicle's title had already been transferred to the wife but that the entitlement to a monetary award of $17,000 for the value of the car could be sorted out on remand).

b. Texas Property

Father argues that the court erred in ordering the unequal division of proceeds from the sale of jointly owned rental property in Texas. He contends that, when a court orders the sale of jointly titled real property, the proceeds must be divided equally. We agree.

Permitting a court "to order the sale of a [jointly owned property], then distribute the proceeds unequally, would circumvent [FL § 8-202(a)(3)'s] restriction on the court's authority." *Hart v. Hart*, 169 Md. App. 151, 164 (2006). "If the court wishes to adjust the

equities between the parties, either with respect to the house specifically *or the marital property generally*, it must make a separate monetary award under FL [§] 8-205." *Id.* at 165 (emphasis added).

c. Mother's Financial Accounts

Father makes two arguments regarding the court's decision about Mother's financial accounts. First, he argues that the court erred in dividing joint and solely titled financial accounts. Second, Father argues that the court erred in failing to consider Mother's other accounts in its award. We agree with both points.

The court did not mention or account for the funds in Mother's other four financial accounts—the Prosper account, the Fundrise account, the Coinbase Wallet, and the Coinbase Exchange account—in any part of the three-step analysis. In addition, the court erred by ordering that various accounts be divided equally. In *Abdullahi v. Zanini*, 241 Md. App. 372 (2019), we explained that the trial court erred in ordering that two bank accounts, deemed marital and titled solely in the husband's name, "be divided equally between the parties" because that would "constitute[] an improper transfer of ownership." *Id.* at 410. Similarly, in *Jeffcoat v. Jeffcoat*, 102 Md. App. 301 (1994), we held that the court erred in ordering that bonds, some of which were in the husband's name and some of which were in joint names, be equally divided between the parties, as the court could not transfer ownership of these accounts from one party to another. *Id.* at 316–17. On remand, all the

parties' financial accounts should be considered along with the other marital property as part of the statutory three-step process.[13] *See id.* at 317.

V.

CUMULATIVE ERRORS

Father argues that the circuit court's treatment of and derision toward him, his counsel, and his case throughout the proceedings warrant a new trial. Since we are remanding on issues involving the regular visitation schedule, child support, and property issues for a new evidentiary hearing, we focus this discussion on whether Father is entitled to a new trial on the issues we have affirmed (i.e., legal and physical custody).

Father claims that the "cumulative error doctrine" applies to various errors by the court and warrants a new trial. He contends the court mistreated him and his counsel compared to its treatment of Mother and her counsel during the proceedings. He claims that he was systematically prevented from presenting his full case due to frequent and unwarranted interruptions by the trial judge. He argues that all these issues infringed on his right to procedural due process, requiring a new trial.

"'Cumulative error' is a phenomenon that exists only in the context of harmless error analysis." *Muhammad v. State*, 177 Md. App. 188, 325 (2007).

> More precisely, it exists only in the context of multiple findings of harmless error. In the case of two or more findings of error, the cumulative prejudicial impact of the errors may be harmful even if each error, assessed in a vacuum, would have been deemed harmless. Where the prejudice from each of two or

[13] *Blake v. Blake*, 81 Md. App. 712, 724–25 (1990), and *Freese v. Freese*, 89 Md. App. 144, 150–51 (1991), illustrate a simple format to be followed when calculating the marital and nonmarital interests of spouses and in deciding whether to grant a monetary award. *Hoffman v. Hoffman*, 93 Md. App. 704, 722 n.5 (1992).

> more errors is fractional, the fractions may add up. Each fraction of prejudice, however, is contingent on an undergirding finding of error. It is in this regard that many promiscuous claims of cumulative error go awry.
>
> In a case involving two or more errors, the thing that may cumulate is the prejudicial effect of two or more actual findings of error, not the effect of two or more mere allegations of error. There must first be error before there is any prejudicial effect of that error to be measured.

Id.

Father claims that the following instances demonstrate cumulative error:

- The court interjected when it thought his testimony was speculative or when it thought his counsel's questions were eliciting "speculative" responses, but it did not do the same regarding Mother or her attorney.
- The court frequently interrupted open-ended direct examination questions posed to Father, labeling them as "calling for a narrative," while allowing Mother to answer similar questions freely during her testimony.
- Father was prevented from explaining why he believed Mother should not receive the Survivor Benefit Plan under his military pension after an unspecified objection from Mother's attorney.
- During the cross-examination of Mother on the second day of trial, the court prohibited Father from asking questions about a dispute concerning Christmas gifts, which affected the court's award of legal custody to Mother.
- The court *sua sponte* prevented Father's counsel from asking him about how Mother interfered when Father requested to exercise responsibility and care for the children during his remote workdays. The court deemed the question "not relevant," stating that "they don't have a set agreement as to how they co-parent inside of the home[.]" He claims that the court refused to hear argument as to the question's relevance, given Mother's claims that she was the primary caretaker and therefore the most suitable candidate for primary physical custody.
- The court prevented Father from testifying about a video from December 2023 during direct examination, sustaining Mother's counsel's objection on the ground that the video had already been discussed on the first day of trial. However, during Father's cross-examination, Mother's counsel inquired about the same video he had previously objected to Father testifying from. The court then instructed Father to answer the question, contradicting its earlier ruling.
- The court permitted Mother's counsel to question Father using a summary exhibit that had only been produced the day before, contrary to its strict

enforcement of discovery rules against Father. These questions, which pertained to purchases made for Father's new residence over the previous month, had not been permitted when Father's counsel attempted to ask them during direct examination.

- Father received unequal treatment regarding objections. In one instance, Mother's counsel asked Father, "Do you have a problem with your memory?" Father's counsel objected because the question was argumentative—an objection that the court had raised many times against Father's counsel during Mother's cross-examination. However, the court overruled Father's counsel's objection, stating, "It's cross." When Father's counsel highlighted this discrepancy, the court simply replied that "that's what your redirect will be for."

As we explained, "there must first be error before there is any prejudicial effect of that error to be measured." *Muhammad*, 177 Md. App. at 325. In each cited instance, Father either does not articulate his argument clearly or fails to support his assertions of error with legal authority. *See* Md. Rule 8-504(a)(6) (requiring that a brief contain an argument in support of the party's position on each issue); *Anderson v. Litzenberg*, 115 Md. App. 549, 578 (1997) ("It is not [the Court's] function to seek out the law in support of a party's appellate contentions.").

In any event, based on our review of the record of these examples, we discern no actual error from which any prejudicial effect might cumulate. *See Muhammad*, 177 Md. App. at 325 ("Eight times nothing is still nothing.") (citing *Gilliam v. State*, 331 Md. 651, 685–86 (1993) ("This is more a case of the mathematical law that 20 times nothing is still nothing."); and *Colvin-el v. State*, 332 Md. 144, 180 (1993) (where claims individually have no merit, there is no merit to the argument that the "whole exceeds the sum of its parts")).

Instead, Father's examples are intended to illustrate how the court allegedly treated him unfairly. We have said that judges "have wide latitude in the conduct of trials and may, when necessary, interrupt and restrict attorneys in the presentation of their cases in an attempt to assure a correct presentation." *Ricker v. Ricker*, 114 Md. App. 583, 594 (1997). Judges should participate directly in trials because they bear the responsibility for the orderly and fair administration of a trial. *Id.* "Particularly in non-jury cases, a trial judge is accorded substantial leeway in participating in the trial because the judge functions as a trier of fact as well." *Id.* We explained:

> It is often helpful to a litigant in a non-jury case to discover the direction that the judge is leaning, or to assess the judge's evaluation of the evidence as it is unfolding. Judges frequently do what juries cannot do during trials and engage in colloquies with attorneys. Those colloquies can contribute to a sharpening of the attorneys' presentations and arguments. Participation by the court in the questioning of witnesses or in commenting on the evidence can promote an orderly and efficient use of court resources.

Id.

However, we cautioned that "[a]ctive involvement by a judge . . . must be done prudently." *Id.* This is because "[e]ven the most unbiased judge, by actively engaging in the trial, runs the risk of appearing to lack objectivity and may chill the attorney's capacity to represent the client's interest most effectively." *Id.* We explained:

> A judge who makes comments that devalue a litigant's presentation midstream may not be forwarding the goals of a fair trial, but instead may lead the restricted party to believe that the judge is unwilling to listen. A judge who creates a courtroom atmosphere that appears unfair to the litigants may unintentionally cause the proceeding to become unfair. The litigants may react by abandoning a planned strategy or line of questioning that could affect the result or the record. A judge's participation should not overreach and disrupt a litigant's development of the evidence. Such behavior can transcend

> the bounds of proper judicial conduct and can go so far as to deprive a litigant of the right to a fair trial.

Id. at 594–95.

"Proper judicial conduct demands that judges refrain from activity that unnecessarily restricts litigants' ability to present their cases and to develop their evidence." *Id.* at 596 (citing the Maryland Code of Judicial Conduct).

> Nothing is so valued in a judge as judicial temperament that forwards the appearance as well as the actuality of objectivity and impartiality. A judge certainly ought not to conduct a hearing in such a manner that permits litigants to feel threatened or to discourage them from presenting their cases completely.

Id. at 597.

"Judicial remarks can be so troublesome, under some circumstances, as to invite reversal, even in a non-jury trial." *Id.* "Remarks by a judge that wrongly suppress critical evidence can alter the course of the trial and the outcome[.]" *Id.* at 598. "The attorneys developing their cases in the courtroom under our adversary system should not be unreasonably restrained from offering relevant evidence to try to convince either the courts or juries to decide in their favor." *Id.*

On this record, therefore, the issue is whether the remarks and conduct by the trial judge deprived Father of a fair trial. *See id.* at 597. Assuming that they were "improper and injudicious," we determine whether they were such that their effect upon the hearing deprived Father of due process. *Id.* "[I]n order to prevail, [Father must] show some nexus between the alleged improper comment [or conduct] and the course of the trial." *Id.* at 598; *see Att'y Grievance Comm'n of Md. v. Kreamer*, 404 Md. 282, 346 (2008) (explaining that

the issue is whether the complaining party "was harmed in any way due to the hearing judge's conduct").

We have reviewed the instances cited by Father and examined the record. Although the court could have exercised greater restraint at times during the proceedings, Father has not shown any nexus between the allegedly improper comments or conduct and the course of the proceedings. The instances cited by Father do not amount to reversible error that warrants a new trial on the issues we have affirmed.

CONCLUSION

As explained, we affirm the judgment as to sole legal custody, primary physical custody, and the exchange location. We vacate the judgment as to the regular visitation schedule, child support, and property issues and remand these issues for a new evidentiary hearing.

As noted, the court has not entered a final judgment on the amount of counsel fees; therefore, the court is free to reconsider its ruling that granted Mother's fee requests and consider them together with any new fee requests by either side that may develop from the remanded proceeding.

Until the court rules on the remanded issues, the vacated provisions of the Amended Judgment of Absolute Divorce will have the force and effect of a *pendente lite* order.

JUDGMENT OF THE CIRCUIT COURT FOR CHARLES COUNTY AFFIRMED IN PART AND VACATED IN PART.

JUDGMENT AS TO LEGAL CUSTODY, PHYSICAL CUSTODY, AND EXCHANGE LOCATION AFFIRMED;

JUDGMENT AS TO THE REGULAR VISITATION SCHEDULE, CHILD SUPPORT, USE AND POSSESSION OF THE FAMILY HOME AND FAMILY USE PERSONAL PROPERTY, AND DISTRIBUTION OF PROPERTY VACATED AND CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; THE VACATED PROVISIONS OF THE JUDGMENT TO REMAIN IN FORCE AND EFFECT AS A *PENDENTE LITE* ORDER PENDING FURTHER ORDER OF THE CIRCUIT COURT;

COSTS TO BE EVENLY DIVIDED.